SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari..... 1
The Opinions of the Courts Below..... 1
Jurisdiction 2
Statutes Involved 2
Summary Statement of the Matter Involved..... 2
The Questions Presented..... 3
Specification of Errors..... 4

Reasons Relied on for the Granting of the Writ:

1. This case presents an important question of federal law which has not been, but should be, determined by this Court..... 4

2. This case was decided in a way probably in conflict with applicable decisions of this Court 7

Appendix:
Statutes Involved 9

TABLE OF CASES CITED:

Chesapeake & Ohio R. R. Co. v. *Carnahan*, 241 U. S. 241 7

Davis v. *Trustees of Chicago, Indianapolis & Louisville Ry. Co.*, U. S. D. C., N. D. Ind., Judge Slick (December, 1937) 6

Engel v. *Pennsylvania R. R. Co.*, City Court, Calumet, Ill., Judge Posanski (1938)..... 6

Ford Motor Co. v. *Beauchamp*, 308 U. S. 331..... 2

McCarthy v. *Palmer*, 29 F. Supp. 585..... 3

Nesbitt v. *Louisville & Nashville R. R. Co.*, 10th Jud. Cir., Ala., Judge Clark (May 11, 1939)..... 6

PAGE

Pepper v. *Litton*, 308 U. S. 295 2

Petry v. *Pennsylvania R. R. Co.*, U. S. D. C., E. D. N. Y., Docket No. 200, Judge Galston (June 20, 1939) 6

Southwestern Brewery & Ice Co. v. *Schmidt*, 226 U. S. 162 8

TABLE OF STATUTES CITED:

Federal Employers' Liability Act of 1908, Act of April 22, 1908, c. 149, §1, 35 Stat. 65; 45 U. S. C. A. §51 ..... 2, 3, 4, 6, 7, 9

Railroad Retirement Act of 1937, Act of June 24, 1937, c. 382, Part I, §1, 50 Stat. 307; 45 U. S. C. A. §228a 2, 3, 4, 5, 10, 11, 12

Carriers Taxing Act of 1937, Act of June 29, 1937, c. 405, §11, 50 Stat. 440; 26 U. S. C. A. §1500 ... 2, 5, 13

Judicial Code, §240, subdivision (a), as amended by the Acts of February 13, 1925, c. 229, §1, 43 Stat. 938; of January 31, 1928, c. 14, §1, 45 Stat. 54; and of June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A. §347(a) 2

OTHER AUTHORITIES CITED:

79 Cong. Rec. (74th Cong. 1st Sess.), p. 13646 6

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of The New York, New Haven and Hartford Railroad Company,

Petitioners,

—against—

JOHN J. McCARTHY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Petitioners, Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered in the above cause on August 1, 1940, affirming a judgment of the District Court of the United States for the Eastern District of New York, and respectfully represent:

THE OPINIONS OF THE COURTS BELOW.

The opinion of Judge Moscowitz in the District Court of the United States for the Eastern District of New York is reported in 29 F. Supp. 585 (R. 528-537). The opinion by Judge Chase in the Circuit Court of Appeals for the Second Circuit, dated July 17, 1940, has not yet been reported but appears at pages 551 through 555 of the Record.

Jurisdiction.

1. The jurisdiction of this Court is invoked under §240, subdivision (a), of the Judicial Code, as amended by the Acts of February 13, 1925, c. 229, §1, 43 Stat. 938; of January 31, 1928, c. 14, §1, 45 Stat. 54; and of June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A. §347(a).

2. The cases believed to sustain the jurisdiction of this Court are:

Pepper v. *Litton*, 308 U. S. 295;
Ford Motor Co. v. *Beauchamp*, 308 U. S. 331.

3. The decree of the Circuit Court of Appeals sought to be reviewed, entitled Order for Mandate, is dated August 1, 1940 (R. 556). This decree affirms the judgment of the District Court.

Statutes Involved.

The statutes involved are the Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, §1, 35 Stat. 65; 45 U. S. C. A. §51), the Railroad Retirement Act of 1937 (Act of June 24, 1937, c. 382, Part I, §1, 50 Stat. 307; 45 U. S. C. A. §228a), and the Carriers Taxing Act of 1937 (Act of June 29, 1937, c. 405, §11, 50 Stat. 440; 26 U. S. C. A. §1500).

The relevant portions of these statutes are set forth in the appendix, *infra*, pages 9 to 13, inclusive.

Summary Statement of the Matter Involved.

The complaint alleges that on September 23, 1938 plaintiff(respondent) was employed by the defendants(petitioners) as a brakeman; that east of defendants' station at

Danbury, Connecticut, he sustained injuries due to defendants' negligence (R. 5, 6). The action was brought under the Federal Employers' Liability Act, Act of April 22, 1908, c. 149, §1, 35 Stat. 65; 45 U. S. C. A. §51 (R. 5). Judgment was entered in favor of the plaintiff in the amount of $22,959.65 on October 23, 1939 (R. 540, 541).

The questions of fact and of law as to whether defendants would be entitled to a reduction of a verdict for plaintiff because of the provisions of the Railroad Retirement Act of 1937 were by stipulation of the parties left to the trial court to decide rather than to the jury (R. 465). The jury found a verdict for the plaintiff in the sum of $22,500 (R. 479). The trial court held that plaintiff was not "permanently and totally disabled for regular employment for hire" within the meaning of §228b, subdivision a(3), of the Railroad Retirement Act of 1937. *McCarthy* v. *Palmer, supra,* 29 F. Supp. 585, 588 (R. 530-536). The trial court also decided that defendants had no right to a reduction of plaintiff's damages in a suit of this nature, regardless of whether or not the injuries were of a total and permanent character. *McCarthy* v. *Palmer, supra,* 29 F. Supp. 585, 588, 589 (R. 530-537). An order denying defendants' motion to reduce the verdict because of the provisions of the Railroad Retirement Act of 1937 was thereupon entered (R. 537-539).

The Questions Presented.

(1) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 regardless of whether or not plaintiff was totally and permanently disabled for regular employment for hire.

(2) Whether the trial court erred in holding that defendants in a suit under the Federal Employers' Liability Act had no right to a reduction of plaintiff's damages by reason of the provisions of the Railroad Retirement Act of 1937 where plaintiff was not totally and permanently disabled for regular employment for hire.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that defendants were not entitled, under the provisions of the Railroad Retirement Act of 1937, to a reduction of the plaintiff's judgment by the amount of the annuity he would be eligible to receive upon reaching the age of 60, by one-half of that annuity, by the amount contributed in taxes by defendants toward that annuity, or by any other amount.

2. In affirming the judgment of the District Court.

Reasons Relied on for the Granting of the Writ.

The petitioners contend that the writ of certiorari should be granted for the following reasons:

1. *This case presents an important question of federal law which has not been, but should be, determined by this Court.*

Defendants' Exhibit I (R. 522, 523), submitted as an exhibit for the court (R. 564), shows that plaintiff was 54 years old on December 17, 1938, and that he had rendered over 30 years of service to defendants.

Section 2 of the Railroad Retirement Act of 1937 makes

eligible for annuities, once they have ceased to render compensated service to the carrier, the following persons:

(1) individuals who shall be 65 years of age or over;

(2) individuals who shall be 60 years of age or over, and

(a) shall have completed 30 years of service, or

(b) shall have become totally and permanently disabled for regular employment for hire;

(3) individuals, without regard to age, who shall have completed 30 years of service and who are totally and permanently disabled for regular employment for hire.

Under §3 of the Act the annuity is computed by multiplying an individual's "years of service" by fixed percentages of his "monthly compensation".

If at the time of the trial plaintiff had been totally and permanently disabled for regular employment for hire, his injury and his thirty years of service would have entitled him to an immediate annuity of $83.20 a month. In any event, he had only to wait the six years before reaching the age of sixty to become eligible beyond all doubt for a retirement pension (R. 522, 523).

In order to provide money for payment of the annuities, the Carriers Taxing Act of 1937 levies an income tax on employees and an excise tax of like amount on employers (26 U. S. C. A. §§1500, 1520). The money thus collected is paid into the general fund of the United States Treasury (26 U. S. C. A. §1530). Annually enough money is appropriated to a special Railroad Retirement Account to provide for estimated disbursements during the coming year (45 U. S. C. A. §228*o*). A sufficient tax is imposed so

that the government is assured of paying no part of the expense of the annuities (Cong. Rec., Vol. 79, p. 13646).

Whether in view of the provisions of the statutes setting up a national retirement system for railroad employees defendants are entitled to any reduction of plaintiff's verdict presents, as Judge Chase of the Circuit Court remarked, an interesting question as to the measure of damages. The question is not only an interesting one but also a new one never before determined by this Court. A number of lower courts have already passed on the matter under various fact situations, and have in every case except the present one ruled in defendants' favor.

> *Davis* v. *Trustees of Chicago, Indianapolis & Louisville Ry. Co.*, U. S. D. C., N. D. Ind., Judge Slick (December, 1937);
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> *Nesbitt* v. *Louisville & Nashville R. R. Co.*, 10th Jud. Cir., Ala., Judge Clark (May 11, 1939);
>
> *Engel* v. *Pennsylvania R. R. Co.*, City Court, Calumet, Ill., Judge Posanski (1938);
>
> *Petry* v. *Pennsylvania R. R. Co.*, U. S. D. C., E. D. N. Y., Docket No. 200, Judge Galston (June 20, 1939).

It is peculiarly the function of this Court to settle the relationship of federal statutes to one another. Definitive action is particularly important where the point at issue will appear constantly in numerous cases. The present situation involves a point which can be raised in any suit under the Federal Employers' Liability Act. If the two questions presented be ruled on at this time, federal and state courts will be relieved of their uncertainty and will be able to dispose of the problem regardless of the particular fact situation offered.

2. *This case was decided in a way probably in conflict with applicable decisions of this Court.*

The Federal Employers' Liability Act has often been held by this Court to allow a plaintiff suing under it to recover his full pecuniary loss, including his past and prospective loss of earnings. See, for example, *Chesapeake & Ohio R. R. Co.* v. *Carnahan*, 241 U. S. 241, 243. But of course a defendant may always prove any facts tending to show plaintiff has not suffered damages to the extent claimed.

In the determination of damages arising from injuries, one element is the impairment of earning capacity. This impairment involves a pecuniary or economic loss which is measured in part by loss of future wages. To estimate this wage loss the trier of fact takes into consideration the various things which may enlarge or lessen the loss, such as prospective wage increases or wage reductions. Since a pension is given as a form of wages or in lieu of wages, the recipient of one is to that extent cutting down his future wage loss. But whether or not a pension be considered to be a form of wages or in lieu of wages, an injured employee's pecuniary loss is mitigated if he receives a pension. The possibility of obtaining a pension is, therefore, under any theory a relevant factor in the determination of an injured employee's damages.

Whether a plaintiff becomes eligible for an annuity on account of permanent and total disability or for some other reason is significant only as deciding the time when the annuity may commence. It is not the reason for the annuity which is fundamental to the issue of damages but rather the fact that a plaintiff's pecuniary loss is diminished by receipt of an annuity.

The familiar principle that a defendant is not entitled to have the damages for which he is liable reduced by

proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of defendant does not control here. In this case defendants have contributed toward whatever annuity plaintiff may receive. This fact relates the situation to the equally familiar principle that a plaintiff cannot set up as an element of his damages anything as to which he has received compensation from defendant. *Southwestern Brewery & Ice Co.* v. *Schmidt*, 226 U. S. 162, 169.

Under the decisions of this Court, therefore, it would be inequitable to let plaintiff recover for loss of future earnings without regard for the diminution of that loss in the form of a pension which defendants' contributions help to make possible.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

R. M. PEET,
Of Counsel.